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No. 98-387

In the Supreme Court of the United States

OCTOBER TERM, 1998

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., individually and on behalf of its members; PHASE II BROADCASTING, INC.; RADIO VANDERBILT, INC.; KEYMARKET OF NEW ORLEANS, INC.; PROFESSIONAL BROADCASTING, INC.; WGNO, INC.; BURNHAM BROADCASTING COMPANY, A Limited Partnership,

Petitioners,

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONERS

ASHTON R. HARDY*
J. MICHAEL LAMERS
JOSEPH C. CHAUTIN, III
Hardy & Carey, L.L.P.
110 Veterans Blvd., Ste. 300
Metairie, La 70005
(504) 830-4646

**Counsel of Record*

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The Court should grant Broadcasters' petition for a writ of certiorari precisely because there is no evidence in the record to support the Fifth Circuit court's decision in this case. The Fifth Circuit court's support for the government's deliberate decision not to present evidence presents a purely doctrinal issue that the government admits is ripe for review. Further delay will not only cause additional harm to Broadcasters, who have already waited four and a half years for relief, but there is every reason to believe that it will also create more irreconcilable interpretations of commercial speech doctrine among the lower courts.

1. This case is the appropriate vehicle for review of the constitutional question presented.

The government is wrong when it argues in its brief in opposition that the record in this case is "unsuitable" for resolution of the constitutional question presented. Opposition at 17-18. The question presented in this case is a purely doctrinal one: where a commercial speech restriction is fraught with internal inconsistencies and where it is enforced in order to suppress lawful, non-speech conduct, may a court uphold it in the absence of a factual record? The Fifth Circuit court said yes, while the Ninth Circuit court said no. The disagreement between the lower courts affects the fundamental right to speak freely and can only engender greater confusion and conflict in an active area of constitutional law. It cries out for prompt review by this Court.

In its brief before the Fifth Circuit court on remand by this Court, the government cited newspaper and journal articles, along with other sources dealing with compulsive gambling, in an effort to support its advertising ban. The Fifth Circuit court held that the government's materials were unpersuasive. Pet. App. 9a. Yet, it nevertheless upheld the ban. It is that error -- the court's upholding the ban even though it rejected the government's effort to support it -- that creates the doctrinal issue at the root of this case.[1] Despite the clear requirement, set forth in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495 (1996), and its precedents, that courts demand evidence to demonstrate direct and material advancement of governmental interests under the third prong of Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 100 S. Ct. 2343 (1980), some lower courts have continued to hold that the government's speculation

[1] In contrast, the district court in Players International, Inc. v. United States, 988 F. Supp. 497 (D.N.J. 1997), rejected the government's effort to support the ban and then correctly struck the ban down. In its petition for a writ of certiorari in Players ("Players Petition"), the government seeks review of the district court's mechanical application of the third and fourth prongs of Central Hudson, arguing that the district court did not give the government's evidence the weight the government thinks it deserves. Such a dispute does not warrant the exercise of this Court's certiorari jurisdiction, because a resolution of the dispute will provide lower courts with little if any additional guidance regarding commercial speech doctrine. In contrast, the dispute in this case goes to the core of commercial speech doctrine, and addresses a fundamental doctrinal issue in a concise and direct manner.

and unproven assumptions are sufficient to satisfy the third prong. See, e.g., Anheuser-Busch, Inc. v. Schmoke, 101 F. 3d 325 (4th Cir. 1996); Eller Media Company and Outdoor Systems, Inc. v. City of Oakland, 1998 WL 549494 (N.D. Cal. 1998); Rockwood v. City of Burlington, 1998 WL 656397 (D. Vt. 1998); Lindsey v. Tacoma-Pierce County Health Department, 8 F. Supp. 2d 1225 (W.D. Wash. 1998). These courts, like the Fifth Circuit court in this case, have used the presence of multiple opinions in 44 Liquormart as a basis for largely ignoring it and, in the process, effectively reviving the deferential standard of review set forth in Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 487 U.S. 328, 106 S. Ct. 2538 (1992). The varied approaches and disparate rulings in the lower courts since 44 Liquormart show the immediate need for further clarification by this Court.

2. The government had every opportunity to introduce evidence in this proceeding and its failure to do so cannot provide a basis for a denial of Broadcasters' petition.

The government made a tactical decision not to present evidence when this case was in the district court. The government joined in Broadcasters' request for a remand in light of 44 Liquormart, but instead of taking the opportunity to offer evidence then, the government went back to the Fifth Circuit and worked to convince it that 44 Liquormart didn't matter. The government had ample opportunity to call witnesses or introduce other evidence, but chose not to do so, relying instead on citations to newspaper and journal articles that the court found unpersuasive. For three reasons, the government's decision

not to introduce evidence cannot provide a basis for denial of Broadcasters' petition.

First, 44 Liquormart did not fashion an evidentiary burden where none had existed before. The Court in its commercial speech cases decided both before and after the Louisiana district court granted summary judgment in this case has required the government to bear a heavy evidentiary burden to justify speech restrictions. See Rubin v. Coors Brewing Co., 514 U.S. 476, 489, 115 S. Ct. 1585, 1593 (1995); Florida Bar v. Went For It, Inc., 515 U.S. 618, 626, 115 S. Ct. 2371, 2377 (1995); Ibanez v. Florida Dept. of Business and Professional Regulation, 512 U.S. 136, 146 & n. 10, 114 S. Ct. 2084, 2090 & n.10 (1994); Edenfield v. Fane, 507 U.S. 761, 772-75, 113 S. Ct. 1792, 1801-03 (1993); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 95-96 & n.10, 97 S. Ct. 1646, 1619-20 & n.10 (1977). For three years prior to 44 Liquormart, Broadcasters repeatedly pointed out in the district court, in the Fifth Circuit appeals court and in this Court in their initial petition for a writ of certiorari that the government cannot rely on speculation and conjecture in order to satisfy Central Hudson's third and fourth prongs. 44 Liquormart reiterated and clarified the extent of the government's burden, which had already been firmly established by the Court's prior decisions. 44 Liquormart, 517 U.S. at 504-06, 116 S. Ct. at 1509-10. Under these circumstances, the government cannot credibly claim that it was justified in relying on a record devoid of evidence.[2]

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[2] It is worth noting that, in United States v. Edge Broadcasting Co., 509 U.S. 418, 113 S. Ct. 2696 (1993), a case

Second, the government's claim that it was surprised by 44 Liquormart is inconsistent with its simultaneous claim that, in essence, 44 Liquormart changed nothing. The government continues to insist, even at this late stage of the proceeding, that 44 Liquormart does not require it to introduce any evidence regarding the efficacy or scope of its ban. Opposition at 19-20; Players Petition at 16. In its brief before the appeals court on remand after 44 Liquormart, the government argued that 44 Liquormart provided no clear precedent and that the court was therefore free to defer to the legislature's decision to promulgate the ban and its abundance of exceptions. The Fifth Circuit panel majority agreed. Pet. App. 10a-12a. Now, when the government states in its opposition that the record in this case is adequate to support the appeals court's decision, Opposition at 19, that statement can only be interpreted to mean that no evidence is needed to support the ban. If this is so, then the government cannot credibly argue that Broadcasters' petition should be denied in order to permit the government to bring more evidence before the Court. The fact is, the Fifth Circuit appeals court is now on record in support of the proposition that the government may suppress lawful non-speech conduct by means of an inconsistent array of speech restrictions without any documented findings concerning the efficacy or scope of its ban. As a consequence, Broadcasters and every citizen in the jurisdiction of the Fifth Circuit court

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heard after Posadas, the government introduced evidence to support an exception to the gaming advertising ban. Clearly, its decision to furnish evidence there, but not here, was a purely tactical one.

have a materially diminished right to speak. The Court should take the opportunity presented by this case to act promptly to correct the Fifth Circuit's serious error.

Third, the government had every opportunity in this proceeding to introduce any evidence it could muster, both before and after 44 Liquormart. If the government truly believed that 44 Liquormart enhanced its burden of proof, then it had an obligation to the court to either ask for a remand to the district court so that it could make an effort to meet that enhanced burden or to join Broadcasters in a request that the Fifth Circuit court reverse its pre-44 Liquormart decision. But, the government did neither. Instead, it went before the appeals court after 44 Liquormart and claimed, as it continues to claim, that the lack of evidence in support of the ban is of no moment. The government made a tactical decision not to introduce any evidence. It prevailed in the Fifth Circuit, with the result that Broadcasters' First Amendment rights have been frozen, and this case has become a dangerous departure from the Court's modern commercial speech cases. The government cannot coherently argue now that, because it declined to place evidence in the record, Broadcasters should not have an opportunity to undo the damage the government caused to Broadcasters' right to speak and to commercial speech doctrine generally.

3. The Court should grant Broadcasters' petition, in order to avoid the harms that further delay will engender.

The government characterizes 44 Liquormart as a set of "divergent views" regarding the contours of commercial speech doctrine. Opposition at 10. As Broadcasters have explained in their petition and in this reply, the inconsistent decisions of lower courts since 44 Liquormart show the potential it creates for confusion in those courts. The stark conflict between the Ninth and Fifth circuit courts of appeals is the most salient and important of all of those inconsistent results. In this case, both the majority and the dissenting opinions explicitly relate concerns about the clarity of the current state of commercial speech doctrine. Pet. App. 2a-3a & 20a. The majority opinion used the fragmented nature of 44 Liquormart as an excuse to ignore it. There is every reason to believe that the Court will witness further irreconcilable interpretations among the lower courts in the articulation of commercial speech doctrine, unless the Court acts now to correct the Fifth Circuit court and resolve the deep conflict between it and the Ninth Circuit court.

The time for such corrective action is now. Further delay will cause Broadcasters even greater harm than they have already endured. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976). Broadcasters have already waited more than four and a half years for relief from the government's ban. The

interference with their right to speak is even more intolerable, given the fact that broadcasters in many states have such a right, because enforcement of the ban has become a patchwork in light of the deep conflicts between the lower courts. The government admits that this matter is ripe for review. Broadcasters are entitled to a grant of their petition, regardless of the activity in the Third Circuit appeals court.

For the foregoing reasons, Broadcasters respectfully request that their petition for a writ of certiorari be granted and that the Court declare the government's gaming advertising ban to be unconstitutional.

Respectfully submitted,

Ashton R. Hardy*
J. Michael Lamers
Joseph C. Chautin, III
Hardy and Carey, L.L.P.
110 Veterans Memorial Blvd.
Suite 300
Metairie, LA 70005
(504) 830-4646

Attorneys for Petitioners

**Counsel of record*

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